



Mock Administrative Hearing



Paper

20/21. Mock Administrative Hearing

Moderator: Rindy Lasus, New Jersey Dept. of Law & Public Safety

Hearing Office Panel, ODOT Section

Dwight Apple, Deputy Chief Hearing Officer

Maurice Russell, Administrative Law Judge

Ron Benckendorf, Administrative Law Judge

Lynne Wehrle, Administrative Law Judge

Dale Hormann, Oregon Department of Justice

Del Huntington, Oregon DOT

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ACCESS MANAGEMENT PRESENTATION

Script

ALJ- TO AUDIENCE:

This presentation is based on portions lifted from a transcript of a hearing that was conducted in Oregon within the past two years, suitably modified of course, to avoid identification of the parties, and to fit in the time allowed. Actually, a hearing like this could take several days. The transcript for the hearing this presentation is based on, runs 275 pages, instead of 19 for this script. We have left the meat of the agency's testimony in the record, though, so you can tell what kind of issues come up in hearings like this.

I am Lynne Wehrle the Administrative Law Judge in this case. Skip Russell (nods) is the agency's attorney. Dale Hormann will represent the Petitioner (property owner) Dwight Apple. Our witnesses are Del Huntington ODOT Manager of the Access Management Unit and Ron Benckendorf, will be the Department Witness.

When the presentation is over, we will ask for a show of hands to see what you think the outcome should be. We will then tell you what actually happened, and open discussion.

ALJ: Okay, we're on the record. My name is Lynne Wehrle, Administrative Law Judge assigned to this case. This is a hearing on the matter of the Notice of Intent to Cancel a Highway Approach Road Permit issued by the Oregon Department of Transportation on October 10, 1999, to Dwight Apple, owner. The notice was issued pursuant to Oregon Revised Statutes Section 374.305 et seq, advising Mr. Apple that the Department of Transportation proposes to cancel the Highway Approach Road Permits located at HIGHWAY 26, Mile Point 27.31 and Mile Point 27.34, in Sandy, Multnomah County, Oregon. The Notice of Intent to Cancel the Permit was issued as noted on October 10, 1999 by District Manager Ronald Benckendorf and advises the owner, Dwight Apple, that he has a right to request a hearing in this matter. Mr. Apple, Petitioner, here, requested a hearing in this case, and all activity by the Department regarding this matter was stayed pending my order.

This hearing involves ODOT Case Number am235-2 for Dwight Apple, owner of the property adjacent to Highway 26 at MP 27.31 and MP 27.34.

Prior to the opening of the record in this case, the issues presented in this case and the procedures to be followed were discussed. This matter is being tape recorded. The tape will constitute the official record of these proceedings, together with the exhibits and submissions by the participants.

It should be noted that I have marked certain items in the file as Exhibits as follows:

Exhibit 1 is a notice to the parties of their rights under ORS Chapter 183.413, the Oregon Administrative Procedures Act.

Exhibit 2 is a copy of the Notice of Intent to Cancel Highway Approach Road Permit;

Exhibit 3 is a notice of today's hearing.

Exhibit 4 is a revised Environmental Assessment Review, dated July 3, 1998.

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Okay, so far we have identified 4 exhibits that are basically foundation as to the procedural status of this case. Counsel, have your respective clients had a chance to review exhibits 1 through 4?

P-Counsel: Yes your Honor.

State-Counsel: Yes your honor.

ALJ: OKAY, I am prepared to receive into the record exhibits 1 through 4 at this time, unless either of you have any objections.

State-counsel: No objection.

P-Counsel: For the record, I object to Exhibit 2, to the extent it purports to establish the propriety of these proceedings, for the reason stated in my objection and request for dismissal.

ALJ: I'm not asking you to waive your objection to the propriety of these proceedings. We'll get to that in a minute, but subject to that general concern do you object to my receipt of Exhibit 2 for foundational purposes, with any other use of the document subject to my ruling on your Request for Dismissal?

P-Counsel: With that qualification, I do not object to receipt of Exhibit 2 into the record. I do object to Exhibit 4 as irrelevant and immaterial unless the state is able to establish a lawful basis for this hearing.

ALJ: I have marked those exhibits as foundation, to show how we have gotten procedurally where we are, today. On that basis I will receive these exhibits, since they are at least relevant to a determination whether this hearing is relevant. I will make note of your objection, however, and address it in the order in this case, as part of my disposition of your Objection and Request for Dismissal.

I also have a hearing memorandum from the Department. Any objections to that being received?

P-Counsel: the same objection I had to the other exhibits.

ALJ: We'll get to that in a minute, counsel. I'll tell you what, I will give you a continuing objection, and I'll fold my discussion of your objection into my discussion of your Request for Dismissal. That way you don't have to worry about waiving anything, and we can save time getting the record started. Okay?

P-Counsel: Well, I guess that's okay. But I reserve my right.....

ALJ: If you have some other objection, counsel, to anything being considered, you can, of course raise that objection. My proposal only applies to objections for reasons that may be subsumed under your Objection to Hearing and Request for Dismissal. Anyone have any problem with that.

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State-Counsel: If it will save time, I'm all for it.

ALJ: Okay. Now we've reserved 5 through 22 for Petitioner's exhibits. Isn't that right?

Both Counsel: Yes.

ALJ: So, I guess the next number in order would be 23. I'm marking the Department's Hearing Memorandum as Exhibit 23, and Petitioner's hearing memorandum as Exhibit 24. Subject to petitioner's continuing objection, I am going to receive Exhibit 23. Any objection to Exhibit 24.

State-Counsel: No objection.

ALJ: 23 and 24 are received. Next is Petitioner's hearing memorandum on the Objection to Hearing and Request to Dismiss. That would be 25. Objection?

State-counsel: none.

ALJ: 25 is received. Now we have the Department's response. That would be 26. Objection?

P-Counsel: Subject to my arguments on the Request, and my continuing objection, no.

ALJ: 26 is received on the conditions noted. So now we're done for the time being. Counsel, you had a motion:

P-Counsel: Motion to Dismiss. I think it's inappropriate to proceed any further than this motion until the State can establish its statutory basis for proceeding. There is no statutory basis for these proceedings. I will cite "SAIF Corporation v. Shipley, 326 Or 557, Supreme Court, 1998 for that proposition.

ALJ: Wait. Slow down. That cite again?

P-Counsel: 326 Or 557.

ALJ: Okay: What does a worker's compensation case have to do with ODOT?

P-Counsel: The Supreme Court held that an agency has only those powers that the legislature grants, and cannot exercise authority it doesn't have. Furthermore, pursuant to the Oregon Administrative Procedures Act, in ORS chapter 183, a hearing on a contested case can only happen when the agency has discretion to

suspend or revoke a right or a privilege of a person. Here, there is no statute giving the agency any discretion to suspend or revoke my client's right or privilege, as they are trying to do. Furthermore, the agency is required to give my client a Notice that refers to the particulars of the statutes and rules involved, and provides a plain and short statement of the matters to be asserted or charged. The notice in this case says, in paragraph three-and I quote: "ODOT proposes to

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cancel the approach road permit previously issued, a copy attached, pursuant to its authority under ORS 374.305 et seq. " That doesn't look like a "description in particularity" to me.

The "et seq" part would take you through the remaining 300 or so chapters of the Oregon Revised Statutes, if you wanted to carry it that far. But it really doesn't make any difference because none of those other statutes gives the Department the authority to hold this hearing, anyway. The state's counsel tries to boot-strap to ORS 326.205 in his memorandum. But that statute, though a general empowering statute, doesn't give him the authority for this. You can't- as a judge-under the statutory construction provisions of ORS 174.010 and .020 add to or take from a statute. You read what's there and apply what's there. Besides, the specific controls the general.

ALJ: Whoa, counsel, you lost me there for a minute. Are you arguing that the notice is inadequate or that the state doesn't have the authority to take the proposed action?

P-Counsel: Both, actually. We say the notice doesn't comply with the Administrative Procedures Act, and therefore must be dismissed, and that the statutes the state relies on do not give the state the authority to take the action proposed.

Besides, the state has impliedly admitted that my client has a property right to those approaches, by calling the permit and "approach road permit." ORS 374.310 says that an approach road permit can't be issued where there are no rights of access between the highway and the abutting real property. Since this permit is for an approach road, it means the department, by issuing the permit, recognized that the owner had a pre-existing property right of access. Nothing in any statute gives the hearings officer jurisdiction to hear a matter involving a property right of access, nor does the state have statutory authority to cancel a permit based on a private right of access. The only thing the state could have done was give a 30 day notice of non-compliance, and then they would have to show-which they can't- that they gave such a notice, and that what they propose to do is a repair or fix-not a removal.

There is no statutory authority of any kind for this proceeding. We object to proceeding from this point forward. I would ask that that objection be continuing, if you decide to go forward.

ALJ: Okay. Anything further?

P-Counsel: That's my objection.

ALJ: Counsel, any response?

State-Counsel: Your Honor, we are talking about permits to use state property, not a property right of access. There may be some situations where a property right to access a state highway exists, but that could only be where the appropriate state officer gave a deed or other conveyance that actually and expressly granted that

right. You can't acquire a private ownership right in state property by adverse possession, no matter how long you use the property, and no matter what informal expressions made by the state could imply an ownership. The Petitioner here has not provided any evidence of the type of written conveyance that would create an ownership interest in the approach. It is suggested that the use of the term "approach road permit" in describing the permit in this case is an admission that Petitioner has a property right in the access, but this is not legally the case. Just because

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some unidentified agent of the state uses the wrong term for a permit, doesn't convert the permit into a conveyance. It stays a permit.

Now, as a permit, it is basically a revocable permission to cross the state property constituting that stretch of ground on the right of way between the improved roadway and Petitioner's property line. By its nature it is cancelable, and, by administrative rule, it is indefinite, not permanent. This permit has been in force for around 18 years. That does not make it a grant in perpetuity.

In this case, the state's intention to close off these approaches has been known for some time. We have had several public hearings in this area to spread the word about the project, and, according to the records from those hearings, Petitioner showed up to those hearings arguing the same as they are today.

The Transportation Commission has been empowered and mandated to preserve the state's highway resources. It is doing that in this case by closing the approaches for reasons that will be discussed in the main argument on the case.

As to the statutory reference in the Notice of Action, I submit that the notice that was given to Petitioner was legally adequate. But, even if it isn't, the notice is still effective unless the Petitioner can show that he or she has somehow been prejudiced by the delay. In this case, Petitioner hasn't even attempted to make such a showing, and would be hard-pressed to do so, with the witnesses who have appeared today, and the ferocity of Petitioner's attack. They certainly haven't been deprived of a reasonable opportunity to prepare for the hearing.

Also, I would point out that one of these permits was for access to a grocery store. I understand that there hasn't been a grocery store at that location for some time. Since the permit is use-specific, and depends on an evaluation of the volume of use that is to be expected from the use of the underlying property, a change of use makes the permit invalid. The property owner has to apply for a new permit to allow the Department to decide whether it is safe to allow an approach given the anticipated volume of use of the approach. So, that approach has been automatically invalidated anyway.

ALJ: Okay, counsel a response?

P-Counsel: Well, ODOT may think it is all powerful, but it's still taking my clients' property when it cuts off those accesses, and recognized that when it called those accesses "approach road permits." That department simply does not have the power to take those accesses in these proceedings. The permits specifically note

that they can be abrogated by a "future legislative act" but don't say anything about administrative fiat. Since there is no future legislative act to authorize the taking, the state would have to act by condemnation, and compensate my clients for what they have lost.

ALJ: Okay, I'm going to take this motion under advisement and address it in my order in this case. So, we're now to the point of the merits in the case. Counsel? (nods to State-counsel).

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State-counsel: First off, we have an exhibit that shows the current configuration of these approaches, and the proposed changes in the approach. We also have two exhibits showing design standards related to this project.

ALJ: Okay, those will be exhibits 27, 28 and 29. If you pass them, I'll mark them now. (marks and returns.) Counsel, (turning to P-Counsel) have you seen these?

P-Counsel: Yes, Your Honor, and I would object to them as irrelevant and immaterial for the same reasons I have previously stated.

ALJ: Well, subject to your continuing objection, sir, I will receive these exhibits conditionally, and address your objection in my order. You know, counsel, to save time I think I'm going to suggest that we assume that you will have the same objection to all the remaining exhibits submitted by the state, and that I will be addressing that objection in my order, so you don't have to raise the same objection to each one. You can figure you've made your record on that objection, and only have to object again if you have something different to say. Is that acceptable?

P-Counsel: I'm not sure. I wouldn't want to waive....

State-Counsel: Your Honor, I will stipulate that Petitioner's objections to relevance and materiality based on the state's lack of legislative authority to take the action proposed can apply to all the exhibits and can be addressed by the Officer in his order, without Petitioner's waiving any rights on appeal.

ALJ: He's made a stipulation that should cover the situation. Now, let's move on, shall we? Counsel?

P-Counsel: Hrmph! I need to speak with my client about this.

ALJ: Okay-we'll take a short recess.

RECESS

ALJ: Now, we're back on the record.

State-Counsel: The properties in question are those marked on Exhibit 28, circled in blue ink. The approaches as they are at present are circled in red on Exhibit 28. Now, on Exhibit 29, you can see that those approaches have been eliminated, but that there is a new approach on the other side of the property, going on to the Old Sandy Highway. Patrons of Petitioner's establishments can turn at Conifer Lane, drive a short block to the old Sandy Highway and make another right, and are at the new approach within 250 feet. I would add that the state has agreed to pay for construction of the new approach. We have also arranged with the county, that operates that road, for a county approach permit to be issued at the appropriate time.

The Department of Transportation has a highway project that's going through here that's going to end-if I'm not mistaken-about 2 miles north of this intersection. That's about here (points on exhibit). The Project runs south to a point off the end of this exhibit, near the intersection of this

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highway and NE 122nd Avenue. The highway is going from a 2 lane to a 4 lane facility throughout this section, with a raised median for substantially its entire length. I would point out that the median is a closed issue that is not a proper subject for this case. The median will be installed regardless of what happens here, today. Because of that, if Petitioner gets what he says he wants, here, he will only have a connection to traffic from one direction.

At the intersection connected with this case, the Department has agreed to construct a left turn bay for southbound traffic to allow potential patrons of Petitioner's establishments to turn up Conifer Lane to reach the approach on the back. That is important, because if Petitioner kept the present approach and didn't get the new approach in back, none of the southbound traffic could reach Petitioner's establishments without going around several blocks and approaching again from the northbound side. So, both northbound and southbound traffic can turn onto Conifer Lane, go one short block, turn right again and reach Petitioner's premises. Petitioner can put a sign, here (points) to tell people where to turn to reach them, and that should do it.

This entire project is going to be constructed within the existing right of way. There will be no additional acquisition or condemnation of property.

So, what I am showing you is that there is a reasonable access to the property, so that the Petitioner is not cut off entirely if we close the direct access to the state highway. That is important because we believe that even if we show you that it is not in the interest of the motoring public to allow those approaches to continue, which is our main burden in these cases, we still have to convince you, under ORS 374.310, that reasonable access remains, because without reasonable access the statute does not allow us to exercise our authority to manage the approaches.

I will say that your decision here will have preclusive effect, that is, that if you decide that the state is authorized to take the action proposed, Petitioner cannot come in tomorrow with a new application for the same approach under the same conditions. That does not mean that if someone, including Petitioner, were to come in with a new application and a different circumstance, they could not be issued an approach road permit if they showed a change of conditions that demonstrated that such an approach was in the public interest.

ALJ: Anything more?

State-Counsel: No, that's about it.

ALJ: (turning to P-Counsel) Counsel, any response?

P-Counsel: This is a hearing to cancel two permits. The basis for canceling those permits doesn't exist in the statute. And whether there's another potential access is immaterial. We're here under the notice for 374.305 to 374.325. Nowhere in those statutes does it say that if you have other reasonable access the state can come in and cut off your main driveway. That's a condemnation issue. If they would like to go through a condemnation hearing, we would be happy to see them there. That's their only legal option to cancel these permits.

ALJ: anything more?

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P-Counsel: No, that's enough.

ALJ: (turning to State-Counsel) Counsel:

You will see in our brief citations to cases where the courts have talked about what constitutes reasonable access. The Department of Transportation is trying to manage access state-wide. They have designed the project involved here to get more bang for the buck, if you will. The more approaches you have on a highway, the more conflicts you have, the more reduction you have in safety, and the less traffic-flow you end up with as a result. This stretch of highway has been a traffic safety corridor for almost 10 years. The reason for that designation is that it has a high accident rate, as you will hear from the witnesses. That high accident rate, in turn, is caused by increasing traffic levels, which have reached a point where the current road, with the number of approaches it has, can't handle the traffic well. This project will be increasing the width of the road to 4 lanes, and increasing the speed limit to 55 miles per hour, except around this intersection where, since there is a traffic signal planned there, the speed will slow to 50. These approaches are too close together, and too close to the intersection with Conifer Lane to allow traffic to flow through here safely at that speed. They have a general degrading effect on the ability of the highway to carry the expected flow. We are finding the same thing in a lot of places around the state, and we are doing what we can, such as this project, here, (gestures to charts) to remedy the problem.

Now, with that, I am prepared to call my first witness.

ALJ: Proceed.

State-Counsel: I would call Del Huntington.

ALJ: I'll swear him in. Sir, please raise your right hand. Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth, and nothing but the truth?

Witness 1: I do.

ALJ: Please state your name for the record.

Witness 1: Del Huntington, that's H-U-N-T-I-N-G-T-O-N.

ALJ: Counsel, go ahead.

State-Counsel: Sir, please describe in general your work experience and present employment.

Witness 1: For more than 25 years I have been involved in the construction trades, as a contractor, surveyor, or engineer.. I was with the Highway Department in California for 10 years, before coming up here to work on highways for the State of Oregon 15 years ago. I am a

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professional surveyor. I serve on several national committees on the subject of access management. I chair a subcommittee of the

Transportation Research Board on preparing a national manual on access management that can be used by state, county and city governments throughout the country. I have been the leader of the Access Management Program for the State for the past 5 years.

S-Counsel: Have you brought with you material that will help in understanding your testimony?

Witness 1: Yessir. (hands over documents.)

S-Counsel: What's the next number? (hands to ALJ, and copy to P-Counsel)

ALJ: 30 (marks)

S-Counsel: Would you tell the hearings officer how the Department of Transportation and the Transportation Commission is looking at highway access?

P-Counsel: I would object to this as being irrelevant and immaterial to these permits. What the State's policy is is irrelevant. We're here on the two permits listed in the Notices.

ALJ: Your objection is noted for the record. Counsel, it seems to me that it's related to the continuous objection I allowed earlier. Can we keep focus? Obviously, if I rule against you I am going to need this information to decide the merits, unless we all want to haul our witnesses back hear in a month or so. (nodding to S Counsel) go ahead.

S-Counsel: You can answer the question, now.

Witness 1: Both nationally, and in the State of Oregon, States and local agencies are looking with renewed interest at the way the system of transportation operates for both efficiency and safety. One of the ways to do that is through access management, which can increase safety dramatically, and increase efficiency

without requiring, in some cases, the purchase of more right of way. In Oregon, there are a total of 84,920 miles of highway in the public system. Of that total, the State operates 7,484, or less than 10 percent. Yet on those few miles, we carry

about 60 percent of the total traffic per day in the state. According to data we've collected, we estimate that in 1995 we experienced about 10,000 crashes because of driveways and intersections. Because of expected increases in population, we think that will increase to 14,000 per year by 2015, unless we do something with the highways to prevent it. That works out to about 800 million dollars cost per year, figuring in a 2 percent inflation rate.

We know from national studies that there is a clear relationship between the number of approaches and intersections on a highway, and the number of crashes that highway will experience. That is because the approaches introduce conflicts in the traffic flow. There are

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more opportunities where crashes can occur. In high speed areas, meaning 45 miles per hour or more, when you increase access points, you increase the number of severe crashes.

We know that we are not going to see a huge increase in gas tax revenues, so we cannot expect to be able to build entirely new roads. So the way to manage the existing system to increase the capacity to handle traffic is to reduce the number of access points. That's why the Oregon Transportation Commission has taken a very serious look at access management, and how to implement better access

management policies to protect the safety and efficiency of the highway system the Commission manages.

S-Counsel: Okay, anything else.

Witness 1: No, that's the overview. I think you may have other witnesses who can go into greater detail.

S-Counsel: Thank you.

ALJ: (looking to P-Counsel) Any questions?

P-Counsel: Yes. (turns to Witness 1): Of those 10,000 crashes per year, isn't it true that none of those crashes, in the past 10 years, have occurred at either of these approach points?

Witness 1: I don't know the answer to that.

P-Counsel: You don't know?

Witness 1: No.

P-Counsel: So you don't know if even one penny of cost has been incurred through crashes because of either of these approach points?

Witness 1: No, I can't say.

P-Counsel: Now, your focus is safety and efficiency, right?

Witness 1: There are other spin-offs, but those are the primary benefits.

P-Counsel: But you do expect people to use the roads, don't you?

Witness 1: Well, yes.

P-Counsel: I mean, if you put 4-foot walls down both sides of the road, that would be better, and then if you walled off both ends, that would be perfect, from a safety point of view, wouldn't it?

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Witness 1: No, that's not correct.

P-Counsel: Now these studies you have referred to, they are generalities, aren't they? They don't apply to specific situations on the ground?

Witness 1: Well, the science of travel and motorist behavior allows us to predict.....

P-Counsel: That's statistical. It doesn't apply to any particular stretch of road, to any particular car on any particular day. Right?

Witness 1: It is the summary of a lot of research.

P-Counsel: Again, that does not apply to a particular car on a particular day?

Witness 1: No. The fact is that if you slow to 10 miles per hour less than the through traffic speed, your chances of being in an accident increase by 90 times.

P-Counsel: Okay. ODOT expects to put a raised median on this road, doesn't it.

Witness 1: I believe so, yes.

P-Counsel: But if you put a center turning lane here, instead, wouldn't the traveling public expect drivers to pull into that lane to turn? Couldn't you do that instead of removing these approaches?

Witness 1: No. This is a high-speed corridor. We wouldn't use a continuous two-way left turn lane on a 55 mile an hour highway. There may be a painted median, but it is not for people to turn out of the travel lane. The kind of lane you are talking about would only be used in an urban environment, where the speeds are much slower.

P-Counsel: Now out of all the miles of highway you've talked about, what percentage of that is on Highway 26.

Witness 1: I don't know. You would have to ask another witness about that.

P-Counsel: You do not know.

Witness 1: I could not swear to an answer.

P-Counsel: That's all I have for this witness.

ALJ: Okay. Anything else from anyone from this witness?

P-Counsel: No

S-Counsel: No

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ALJ: You can step down. You can leave if you want, or stay and watch . It's up to you.

Witness 1: Thank you , Your Honor.

ALJ: (turning to S-Counsel): Any more witnesses?

S-Counsel: Yes. Call Ron Benckendorf.

Witness 2: Right here. Where shall I sit?

ALJ: That's fine. (pointing). Please raise your right hand. (witness raises hand) Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth, and nothing but the truth?

Witness 2: I do.

ALJ: Please state your first name for the record:

Witness 2: Ron Benckendorf, that's B-E-N-C-K-E-N-D-O-R-F.

ALJ: Thank you. Counsel?

S-Counsel: Could you state your present occupation, please?

Witness 2: I am currently the District Manager for District 1, of the Oregon Department of Transportation.

S-Counsel: Did you have any material that you brought here to testify from?

Witness 2: I have this (hands packet of documents to S-Counsel)

S-Counsel: (turning to ALJ) Should these be marked as 31?

ALJ: Yes. But did you intend to offer 30 into evidence?

S-Counsel: Oh, you're right. I offer Exhibit 30 to be received into the record.

P-Counsel: I object.

ALJ: On what grounds, besides that contained in your continuing objection?

P-Counsel: These documents are hearsay, and are also cumulative.

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ALJ: Overruled. I will consider your continuing objection to these exhibits for discussion in my order. As far as this specific objection is concerned, hearsay is generally admissible in these proceedings unless you can think of some more specific objection.

P-Counsel: No, I just oppose consideration of hearsay in these proceedings, as they prevent me from cross-examining the state's witnesses.

ALJ: Be that as it may, that type of objection goes to weight, rather than admissibility, and goes more properly in final argument.

P-Counsel: I disagree with that. I....

ALJ: Counsel, I have ruled. Exhibit 30 is received. There will be no more discussion. Your prerogative is to appeal the decision.

P-Counsel: I certainly shall.

ALJ: Fine. Proceed.

S-counsel: Okay, now I've marked this as exhibit 31. Please refer to it if you need to. Now, what are your duties as District Manager?

Witness 2: I am responsible for maintenance and operations in the two counties, Multnomah and Clackamas County.

S-Counsel: If I want to construct an approach road to a state highway, would I have to go through you?

Witness 2: That's correct. The Oregon Administrative Rules assign the responsibility for approach road permitting to the Region Manager or his/her designee, and that's me. I then assign subordinates to exercise it in particular cases for the most part.

S-Counsel: So could you go into the background of this highway—this project, a little bit?

Witness 2: In Oregon there are four main classes of highway: Interstate Highways, highways having statewide importance, highways having regional importance, and highways having district importance. Highway 26, the highway involved here, has been classified by the Department as a region-level highway, meaning that it serves functions beyond the district level. It doesn't just move traffic between the two cities, it also serves the entire river basin, and provides a main route for trips to Eastern Oregon across the Cascades. It was established as a safety corridor about 10 years ago, because it has an accident rate well above the statewide average. Many of the crashes that have occurred on this highway involved vehicles making turning movements, such as rearend crashes, or so-called angle crashes from the rear. The number of approach points is very high, and every approach point creates a conflict point, in this case, where the speed differential between people entering and leaving the highway, and the through traveler, driving at 55 miles per hour, is great. This creates a very dangerous situation.

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This particular section of highway has the highest number of fatal crashes at intersections in the region.

S-Counsel: And where are the intersections you are talking about, in relation to the approaches at issue here?

Witness 2: The worst one is about 1/2 mile south of that location, although all the intersections along the highway have higher than average accident rates.

S-Counsel: Go ahead.

Witness 2: From NE 122nd, to a point about a mile south of these approaches, the highway has 4 through lanes and a continuous two-way left-turn lane, all at posted speeds of 35 or 40 miles per hour. At the end of that stretch the highway narrows to two lanes, and increases to 45 miles per hour, which continues past the area where these approaches are located. Because of development throughout the region, traffic counts have increased dramatically, and are expected to reach a point fairly soon where a 2-lane highway will fail completely to accommodate the traffic flow. In 1995, that stretch of highway showed an average daily traffic of 13,000. That's projected to more than double to nearly 27,000 by 2017. The Department has graded this highway as grade D on a scale where grade A is free flowing traffic without interaction, and grade F is complete gridlock. The Transportation Commission assigned an expected service-level for this highway of grade C. It's already below that, and will get worse unless something changes. We do not expect the population of this part of the state to drop, or even slow down its increase in the near future. The only other possible change is to reconfigure the highway to increase the volume of traffic it can carry. That's what this project is intended to accomplish, and access management is an important tool in that effort. As Mr. Huntington said, national studies have shown convincingly that access points onto the highway produce conflict points and increase the danger of crashes, as well as reducing the flow of traffic for efficient use of the highway.

S-Counsel: Could you elaborate on what you mean by "conflicts?"

Witness 2: The easiest way to do that is to compare this highway with Interstate 84. On the interstate, you get on, and you go, without worrying about anyone stopping in front of you to make a turn, or turning onto the highway at a speed much slower than the through traffic flow. There are very few places, relatively speaking, to get on, and those are at or nearly at the speed of through traffic. That makes it a very easy facility to drive on, and permits it to handle high loads of traffic at high speeds. When you compare that to a facility like this one, where there are many access points, people stopping to make left turns, and everything else, there are many many more conflicts to deal with, and driving is much more difficult.

S-Counsel: I just have to pay more attention?

Witness 2: Well, yes, you have to be much more aware, and you have to stop or slow down much more often.

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S-Counsel: Now can you accomplish all that you want to accomplish within the current right-of-way.

Witness 2: That's one of the goals, anyway, to avoid taking people's property. Right of way takings on a project of this magnitude are difficult. They impact people's homes, etceteras, and the more we can avoid that, the happier our customers are. It makes a project much easier to develop and to build, so that is a major goal, to minimize right-of-way takings. You can't eliminate them altogether, but you really do want to minimize them if you can.

S-Counsel: Have you experienced problems such as you've described here in the past?

Witness 2: Yes. 10 years ago, or so, we built several facilities where we were not very aggressive in access management. People built along them, adding new approaches to the highway, as the population of the whole area grew. Almost from the beginning we started having crashes along them. In some cases, we are now going back and building a whole new facility at great cost to the public because that road simply will not carry the traffic people are putting on it now.

S-Counsel: And when you do that, you have to condemn people's property, and worry about other socio-economic and environmental impacts?

Witness 2: Exactly. They're expensive, and very disruptive of people's lives. We understand how difficult this kind of thing can be, although if we let it go, the fix would just be that much worse.

S-Counsel: Did you get public input before you finalized the plans for this project?

Witness 2: Oh, yes. We've been having public meetings since well before I came here, to receive comments on the proposals. The design has changed a great deal, since then, some of it in response to comments from the Petitioner in this case.

S-Counsel: Oh?

Witness 2: We met Mr. Apple several times to discuss this particular access issue, and have tried to find a solution that is acceptable to all parties. For example, as has been mentioned, we intend to run a raised median down the center of the project. After meeting with Petitioner, here, we agreed to put a break in the median so that southbound traffic can turn left at the intersection, here, to get to Petitioner's establishment from the cross-street.

In addition, we hired a consulting firm out of Portland to do an analysis of the impacts of the access management aspects of this project. They concluded that there would be little if any impact on Petitioner's business, among others. People who intend to patronize their businesses know where they are and come here planning to go to them. So, it was their feeling that the changes in the approach would still leave them a reasonable access.

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Basically, we have eliminated 25 of the 43 existing approaches, and we feel that when the project is done we will have a facility that will operate much more efficiently, and last a long time, and serve the public well.

S-Counsel: So, is it your opinion that these approach permits need to be canceled in the public interest?

Witness 2: Yes.

S-Counsel: How long have you been aware of this property?

Witness 2: At least 5 years.

S-Counsel: Now, one of the approach permits is for a grocery store, is it not?

Witness 2: Yes, that's the one at milepost 27.31.

S-Counsel: Have you ever seen a grocery store in either of the buildings on this property?

Witness 2: No grocery store has operated on this property at least since I have been here, for the last 5 years.

S-Counsel: One of the drawings you produced as part of Exhibit 31 shows a projected entry to the property from Conifer street, is that right?

Witness 2: Yes, but that is property in a different ownership that is not a part of this hearing. To get to the property, people could turn east on Conifer, then south on Old Sandy Highway, and the approach would come off the county road, about 200 feet in from the intersection.

S-Counsel: Did your consultants consider the impact on Petitioner's operations of moving the approach to that point?

Witness 2: Yes.

P-Counsel: Objection. Irrelevant. Hearsay.

ALJ: You've already made your record on the relevancy objection. I'll rule on that in my order. And I've already noted that hearsay is admissible. You want to make an offer of proof why this particular hearsay is unreliable?

P-Counsel: I have no way of testing it to determine what information they used to reach their conclusion. They could have been reading tea-leaves for all I know.

ALJ: Your objection is duly noted. I overrule it, as to admissibility, but I'll consider it in evaluating the weight to give this report. Go ahead counsel.

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S-Counsel: What did your consultants conclude?

Witness 2: They compared this situation with similar changes in access of similar businesses in other areas of the country, and concluded that the change would not have a significant effect on the business conducted there. Depending on which direction you're coming from, the total change in distance people have to travel to reach the business from its current configuration is about 500 feet—less if you're approaching from the North. It is just not that difficult to reach. Besides, we couldn't leave both the approaches here, under current design standards.

S-Counsel: Meaning—

Witness 2: These two approaches are much too close together. The current design standards for regional highways is 990 feet between approaches. In this case, because we are signaling this intersection, the speed limit will drop to 50 miles per hour 1/4 mile before the intersection in both directions. The design standard for distance between approaches at 50 miles per hour is 560 feet. That is still a lot more than the distances here. These approaches are only around 150 feet apart, and both of them are less than 560 feet from the intersection. Much too short a distance especially given that they both go into the same parking lot.

S-Counsel: Okay. That's all I have.

ALJ: You want to offer 31?

S-Counsel: Yes.

ALJ: (pause) 31 is received. Counsel, any questions?

P-Counsel: May I have a short recess to talk with my client?

ALJ: Of course. We're in recess. (turns off the tape recorder).

P-Counsel: Are you aware of any crashes that have occurred near these approaches points?

Witness 2: Just one, where a motorist lost control and slid into a ditch.

P-Counsel: That wouldn't have anything to do with these approaches, would it?

Witness 2: I don't know. Depends on why the driver lost control.

P-Counsel: Has the accident rate dropped on this section of highway since it was designated a safety corridor, with a reduced speed limit?

Witness 2: Yes.

P-Counsel: In fact, it is now below the state-wide average isn't it?

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Witness 2: Marginally so, perhaps, yes, but----

P-Counsel: You can expand on that for your own counsel, later. Right now it's my time. Isn't it true that the accident rate is below average for this road?

Witness 2: Yes.

P-Counsel: Now, you expect traffic count to reach almost 27,000 by the year 2017, is that right?

Witness 2: Yes.

P-Counsel: And how did you reach that conclusion?

Witness 2: There are models used to project these things?

P-Counsel: And models are rarely accurate, are they?

Witness 2: There are varying degrees of accuracy, depending on the model.

P-Counsel: So what we're really talking about is a wild-ass guess, aren't we?

Witness 2: Wait a minute, that's ----

P-Counsel: There are a lot of places with traffic counts more than 24,000 without raised medians, right..

Witness 2: Yes, but----

P-Counsel: Right?

Witness 2: Yes.

P-Counsel: Now there are others on this stretch of road that got to keep their approaches, didn't they.

Witness 2: A few.

P-Counsel: Like the Jacobs?

Witness 2: Yes. And as to that----

P-Counsel: Please elaborate on your own time.

Mr. Benckendorf, the real reason you're taking the approaches here and not in some of the other locations is because there's not enough people to complain, the politically disempowered are here, and it's something you can do and get away with?

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Witness 2: No. The reason we're doing this is because we're investing 8.3 million tax dollars and it needs to be done right the first time.

P-Counsel: I have no further questions.

S-Counsel: You were cut off by counsel regarding the Jacobs. What were you going to say?

Witness 2: Mr. and Mrs. Jacobs had no reasonable alternative access. We allowed them an approach on the highway because they would otherwise have been land-locked. There are a few approaches like that out of the 43 originally on the highway that we have left. But those, like Petitioner in this case, that had reasonable alternative access were removed because they would not experience any serious loss because of the removal.

S-Counsel: Was there anything else?

Witness 2: Yes. In most of the cases where traffic counts were 24,000 and had no raised medians, the area was urban, and the speed limits down around 35 miles per hour or so. This is a safety corridor, so right now the speed limit is 45 miles per hour at this location. But it is a regional highway. A 45-mile an hour speed limit, and a D level of service are unacceptable. We need to improve this highway so we can increase the speed limit to levels more in keeping with its role in regional transportation. We are not going to allow traffic to be tangled up throughout the region to allow this one landowner two approaches he doesn't really need, anyway.

S-Counsel: Nothing further from this witness.

ALJ: Anything further at this point?

S-Counsel: Nothing for now.

ALJ: (looks at P-Counsel): Counsel?

P-Counsel: Yes. I would ask that Dwight Apple be sworn.

ALJ: Mr. Apple, please raise your right hand. Do you promise on penalty of perjury to tell the truth?

D. APPLE: I do.

ALJ: Please state your full name.

D. APPLE: Dwight Apple, as in the fruit.

P-Counsel: Mr. Apple, I hand you a document. (Turns to ALJ) What number is this?

ALJ: Let's see. We're at 5 in the numbers reserved for Petitioner, now?

S-Counsel: I think so, yes.

P-Counsel (writes on document) I hand you a document marked Exhibit 5, and ask if you recognize it.

D. APPLE: Yes. That's the deed that Grace Harding gave to Charles Wilson, in 1944. It's the deed to the property I bought from Charles Wilson in the 60s.

P-Counsel: Your honor, Exhibit 5 is a Warranty Deed, dated January 3, 1944, that is in the chain of title to this property, from one previous owner to her successor, my client's predecessor in title. You will note that it states a grant of access to the highway. Since this deed predates the

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legislation under which ODOT claims to have the authority to regulate approach roads, it creates a property right that the state may not take without compensation.

ALJ: (To S-Counsel) Any objection?

S-Counsel: I don't see the relevance of a grant from one private party to another. That can't bind the state on the use of its own property, I wouldn't think.

ALJ: Well, I think I'll receive it, and we'll see where the argument goes from there. It is useful to the inquiry at hand, since it shows that the approaches were in existence before 1951, when the first legislation was enacted.

ALJ turns to audience:

OKAY: that concludes the evidence we will present, today. Counsel? (turns to S-Counsel):

S-Counsel: (faces audience) In the rest of the state's case, we would put on additional evidence showing that there is a safety issue, and that there is reasonable alternative access. We would also present the economic analysis showing that the property owner would not suffer significant economic harm from this change, and any way that even if there were such harm, the state still has the authority to take its action.

P-Counsel: From this point, we would continue to hammer on the question whether this is a taking of a property right. We would also put on evidence that Petitioner would experience substantial economic hardship from the state's action.

ALJ: You have gotten the outline of the case.

Any questions?

TIME FOR QUESTIONS.

Now, before we wrap up:

How many out there would uphold the cancellation of the permits?

How many would let the Petitioner keep one? Both?

How many think the ALJ should grant the Motion to Dismiss, based on the problems with the notice?

How many would deny the Motion?

Who, out there, would have handled the entire thing differently?

We are now ready to present the decision in the case. Under Oregon process, the ALJ normally does not state a decision at the hearing. Instead, the decision is mailed some time after the record closes. (sits, picks up a paper and reads)

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"The motion to dismiss for improper notice is denied. Petitioner appeared at this hearing, and had a full opportunity to argue the issues and present evidence. There is no evidence that Petitioner was prejudiced in any way by the features of the notice submitted.

The cancellation of the two approach permits is upheld. Petitioner has not shown a property interest in the permits that would limit the State's authority to manage access to its highways. The deed does not bind the state regarding disposition of its own property, and the state cannot be bound by the passage of time except in specific circumstances that do not apply here."

The floor is now open for questions and discussion.